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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., AND INTERTYPE CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the Court of Appeals is reported at 219 F. 2d 90 and appears in the Appendix to the petition, pp. 71–87.[1]

[1] The opinion dealt with four consolidated appeals: one by the United States from a condemnation judgment in favor of petitioners Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation (No. 11017) and three appeals by respondent Clark-Congress Corporation from judgments on cross-claims and a counterclaim in favor of Intertype Corporation (No. 11018), Merchants Matrix Cut Syndicate, Inc. (No. 11019), and The Advertising Checking Bureau, Inc. (No. 11020). The court of appeals entered two judgments (Pet. App. 88–90): one in No. 11017 reversing the judgment against

JURISDICTION

The judgment of the Court of Appeals reversing the condemnation judgment against the United States was entered January 17, 1955 (Pet. App. 88). Petitions for rehearing were denied February 23, 1955 (Pet. App. 91). The petition for a writ of certiorari was filed April 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly reversed the judgment for improper argument to the jury.

2. Whether the trial court's rulings on the admissibility of evidence and its instructions to the jury constituted reversible error in that they resulted in the application of an erroneous measure of compensation by virtually eliminating "market value" from consideration and permitting the taking account of special value to the Government and the lessees and of enhancement due to the purpose for which the property was taken.

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the United States, and the other in Nos. 11018–11020 reversing the judgments against Clark-Congress. Petitioners in a single petition seek review of both judgments of the court of appeals. The United States is filing this brief in opposition with respect to review of the judgment in No. 11017, and is filing a separate brief as *amicus curiae* setting forth its reasons why certiorari should not be granted with respect to the judgment entered in Nos. 11018–11020.

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STATEMENT

In 1951, General Services Administration was seeking suitable space in the City of Chicago, Illinois, for use by the Bureau of Public Debt, Treasury Department, and on June 22, 1951, it entered into a lease with Clark-Congress Corporation, owner of the Rand McNally Building in downtown Chicago (R. 81–93). This 10-story combination office and loft building contained approximately 500,000 square feet of usable space (R. 82, 141–142). At the time, at least 80,000 square feet was vacant (R. 81, 145, 152), and the balance was occupied by approximately 80 tenants under leases which ran for varying terms (R. 141). Among these tenants were Intertype Corporation (hereafter called Intertype) which occupied 10,500 square feet under a lease running to December 31, 1958; Merchants Matrix Cut Syndicate, Inc. (hereafter called Merchants) which occupied 10,000 square feet under a lease running to August 31, 1953; and The Advertising Checking Bureau (hereafter called Advertising) which occupied 20,000 square feet under a lease running to April 20, 1955 (Pet. App. 73).

Under its lease, the Government acquired (a) the use of 80,000 square feet of vacant space, and any other blocks of 12,000 square feet or more which later became available, for the period from August 1, 1951, to December 31, 1951, at the rate of $1.33½ per square foot per annum, the lessor to furnish utilities and elevator service,

and (b) the use of the entire building, subject to then existing tenancies, for the term from January 1, 1952, to December 31, 1956, with the option of renewing for an additional five years to December 31, 1961, at a rental of $1.00 per square foot per annum, the Government to pay for all utilities, services, and interior and exterior repairs (R. 81–85). The Government had the right during the term of its lease to make alterations to the building, and reserved the right to remove any improvements which could be removed without damage to the building (R. 85). Subsequently, it expended about $2,500,000.00 in remodeling the building to suit its requirements (R. 609–610).[2] The lease declared that, the Government having indicated that it was considering condemnation proceedings to acquire a leasehold interest, the lease was entered into in lieu of condemnation proceedings or an award therein (R. 92). And Clark-Congress agreed to cooperate with the Government in securing the termination of existing tenancies (R. 91).

On the same day that the lease was executed, the Government advised all tenants by letter that the building was needed for government use (R. 142, 584, 599). From August to December, 1951, the building was vacated by all of its tenants

[2] Contrary to the implication of petitioners' assertions (Pet. 7, 35, 38), the lease did not oblige the Government to expend any amount in remodeling the building (see R. 85).

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except Intertype, Merchants and Advertising (R. 945). On December 12, 1951, the Government filed this condemnation proceeding to acquire the right to use the space occupied by the three remaining tenants for a term from January 1, 1952, to December 31, 1956, extendible for an additional five years at the election of the Government (R. 7–9). On the same day, a declaration of taking was filed, and $21,895.00 was deposited as the estimated just compensation for the use of the space from January 1, 1952, to June 30, 1952, only (R. 9–11).[3] Immediate possession was sought, but the district court permitted Intertype to remain in possession until January 31, 1952, and permitted Merchants and Advertising to remain in possession until May 31, 1952 (R. 35–37).

On September 23, 1952, the district court entered a summary judgment that Advertising was not entitled to any compensation for the taking of the space it occupied because of a condemnation clause in its lease (R. 97).[4] This judgment was

[3] Of the total deposit, $6,645.00 was deposited for space occupied by Merchants, $5,250.00 for space occupied by Intertype, and $10,000.00 for space occupied by Advertising (R. 11). The deposit was made for the "use of the persons entitled thereto" (R. 10), including Clark-Congress, lessor (R. 8), not for the sole benefit of petitioners (see Pet. 11).

[4] Merchants occupied one room in the building (No. 844) under a separate lease which contained a similar condemnation clause Pet. App. 73; R. 64–65). Hence, it was not

affirmed by the Court of Appeals (*United States* v. *Advertising Checking Bureau,* 204 F. 2d 770 (C. A. 7)), and review of it is not sought in this Court. The claims of Intertype and Merchants were tried before a jury in January 1953 (R. 6). The jury returned verdicts of $131,500.00 as just compensation for Intertype and $43,750.00 for Merchants (R. 559–560, 616–617). Judgment was entered upon the verdicts (R. 618–620). The Government's motion for new trial or judgment notwithstanding the verdicts (R. 620–626) was denied on June 25, 1953 (R. 1077), and the Government filed notice of appeal on August 17, 1953 (R. 1122–1123). In its statement of points upon appeal, the Government specified 89 errors on the part of the district court, asserting improper argument to the jury and the application of an erroneous measure of compensation by virtue of incorrect rulings on the admission and rejection of evidence and of faulty instruction of the jury (R. 1125–1129).[5] The proceedings which were the

entitled to and did not receive any compensation for such space.

[5] Petitioners assert (Pet. 36) that there was a "delay of more than a year after filing a notice of appeal before government counsel certified the record to the Court of Appeals." In fact, both the United States and Clark-Congress filed notices of appeal on August 17, 1953 (R. 1122–1123, 1130–1134), and time for docketing the appeals was extended for the full 90-day period as permitted by Rule 73 (g), F. R. C. P. (R. 1137). The clerk of the district court certified the transcript of record on November 10, 1953 (R. 1140), and the record was filed in the Court of

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basis for the major points on the Government's appeal may be summarized as follows:

A former rental agent for the building was the Government's first witness, and during his testimony there were offered in evidence five leases of space in the building comparable in area to petitioners' space. The leases had been executed between February and October, 1950, and called for rentals ranging from $1.03 to $1.18 per square foot (R. 134–138, 149–153). The court sustained objections to this evidence based on the ground that these were only five out of 20 or 25 leases made during the same period (R. 152). The court also suggested that an extraordinary condition prevailed at the time in that there was a large vacancy in the building (R. 152–153). The witness had stated that there was no substantial difference in the building's renting conditions between 1950 and 1951 (R. 137). By way of contrast, over the Government's objection that it was a mere offer and therefore inadmissible, one of petitioners' witnesses was permitted to testify as to a lease negotiated for space in the building in 1949, but never executed (R. 286–287, 591–593).

One of the Government's expert witnesses ex-

Appeals on November 12, 1953 (see cover of printed record in that court), less than 90 days after the appeals were taken. The printed record was not available until June 11, 1954, and thereafter briefs were filed in July and August, 1954. The appeals were heard on September 21, 1954, and a decision rendered on January 17, 1955.

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pressed the opinion that Merchants' lease had no value because fair market rental was $1.30 per square foot, while the actual rent under its lease was $1.58 per square foot (R. 178). He valued Intertype's lease at $7,500.00, being of the view that fair market rental value of its space was $1.25 per square foot as opposed to the actual rent of $1.00 (R. 178–180, 182). His estimates of value took into consideration all the terms of the leases (R. 178–179), including the facts that both leases prohibited assignment without the approval of the lessor, and that Intertype's lease contained a provision for cancellation at the option of the lessor in the event of a sale of the building (R. 62, 566–567). On cross-examination, he stated that the value of Intertype's lease would be $18,000.00 if it were not for the cancellation clause (R. 188). Subsequently, the Government requested an instruction (IX) that the provisions of the leases should be considered by the jury (R. 612–613), and Intertype asked an instruction that the nonassignability clause and the cancellation clause be disregarded (R. 492–494). Although of the opinion that "an assignable lease is worth more than a non-assignable lease" (R. 486) and that the cancellation clause in Intertype's lease affected value (R. 494), the court refused both requests, apparently because of the difficulty of phrasing such an instruction and because the court did not "want to say something

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to the jury that will have them poring over these long printed clauses" (R. 494, 511).

The Government also offered the testimony of an expert witness who had inspected the building in May, 1952 (R. 221). He likewise expressed the opinion that the value of Merchants' space was less than the rent payable under its lease (R. 226–227). Objection was made to his expressing an opinion as to the value of Intertype's space on the ground that he had not seen the space in the condition it was at the time it was occupied (R. 227–228). At this point, the Government's project manager in charge of alterations in the building described the physical condition of the space and identified photographs of it (R. 230–261). The expert's opinion concerning Intertype's space was then re-offered but was excluded (R. 262–263). Immediately thereafter, after considerable discussion, the jury was taken to view the building (R. 263–274), and was later instructed that the view was part of the evidence in the case (R. 552).

Petitioners' first witness was an official of Intertype who was permitted over objection to testify as to the nature of the company's business, the other buildings that had been examined prior to moving into the Rand McNally Building, and other matters indicating a special value to Intertype of the space occupied (R. 274–284). Also over objection, evidence as to Intertype's cost of moving out of the building, the profits lost during

the moving period and other items was admitted (R. 297–307).[6] Likewise admitted through this witness over objection was a group of letters written in the summer and fall of 1951, some by or to government agents and others by or to Clark-Congress or its rental agent, and testimony concerning governmental activity in the building at the time (R. 308–315, 317–319, 599–608).

Petitioners' next witness was Eugene Mulhern who valued Intertype's interest at $52,370.00 (R. 346). This was based on a rental value of $1.87 per square foot which was, in turn, based on an estimate of 35 cents per square foot representing ground rent, taxes, insurance and depreciation (R. 341) plus 96 cents per square foot for cost of operating, i. e., heat, repairs, etc. (R. 342), plus 25 cents per square foot as return on investment (R. 343). His $1.87 figure also included 12 cents per square foot for improvements made by Intertype (R. 346). He valued Merchants' space at $1.75 per square foot (R. 348).

Petitioners' next witness, Gilbert Scribner, valued Intertype's space at $1.75 per square foot (R. 357). During his direct examination, the lease between Clark-Congress and the United

[6] Petitioners assert (Pet. 39) that the evidence of moving costs was introduced by the Government. It is true that on cross-examination of the witness government counsel introduced exhibits showing the detail of the claimed moving expenses and other items (R. 319, 322, 577–579), after the Government's objection had been overruled and much direct testimony introduced on the subject (R. 297–306).

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States was admitted in evidence, over objection (R. 357–358).[7] Also over objection there was admitted a stipulation that the total costs of the alterations to the building by the Government were estimated not to exceed $2,500,000.00, more than two million dollars having been spent by November, 1952 (R. 359–360, 609–610). The stipulation was an agreement as to the fact but not as to the admissibility, competency, relevancy or materiality of the facts as evidence (R. 609). Mr. Scribner computed the rental being paid by the Government at $3.20 to $3.76 per square foot (R. 362). This latter figure was the sum of the basic rent under the lease ($1.00), an amount required to write off the cost of improvements made by the Government during the five-year lease period ($1.15), and an amount ($1.661), derived from average operating costs in 40 Chicago buildings, excluding the costs ordinarily paid by the lessor (R. 361).

For Merchants, its president testified concerning its business needs, etc., and, as in the case of Intertype, correspondence in the summer and fall of 1951 was admitted in evidence over objection (R. 386–409, 584–591). Rebuttal testimony for the Government was given by Mr. Roesing, president of Clark-Congress, whose statements as to the actual operating expenses were stricken after

[7] One of the government experts had previously been cross-examined, over objection, as to the rental provided for in the same lease (R. 198–203).

discussion (R. 434–441, 449–453). At the close of the evidence, it was stipulated that the taking as to Intertype would be treated as involving the entire seven years remaining of its term (R. 108–109). The Government thereupon moved to strike all of the evidence as to moving expenses, etc., but the court stated that it would rather take care of it in the instructions (R. 463–466). A lengthy discussion was then had concerning the parties' proposed instructions (R. 467–511).

In his argument to the jury, counsel for Intertype dwelt at length on the amount of rental the Government was paying (R. 521) and, over objection, asserted that after the term the owner would get back an improved building (R. 522). Applying the government rental, including the operating expenses and amortization of improvements, he reached a total for Intertype's space of $164,810.00 (R. 522). Also, over objection, he relied upon the amount deposited with the declaration of taking, which was for a six-month period from January 1, 1952 (R. 527). He argued that the Government made a deal with Clark-Congress, and that they had said to themselves that Intertype's lease has a cancellation clause on six-months' notice, and that "We will kick them out" (R. 527). This, he said, was the reason the deposit was computed for a six-month period and, applying that figure to the entire remaining term, he arrived at $73,500.00 which, he said, "is what the Government thought our lease was worth"

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(R. 527). Shortly thereafter, he criticized at length the procedure whereby the Government made a lease with Clark-Congress rather than condemning all interests, argued that the Government was paying money to Clark-Congress and that "They are giving us no chance at that money, which we are rightfully entitled to under ordinary condemnation" (R. 529–530). This he referred to as a "nice little trick" and "this jury may or may not let them get away with it" (R. 530).

Counsel for Intertype then referred to the fact that the court would instruct the jury to disregard the figures as to moving expenses, etc., but went on to say that while he couldn't put in the figures the jury knew it costs money and "We have paid out the money it cost us to move—out of pocket—a year ago" (R. 531). Objection was sustained at this point, but there followed the statement that "We will be suffering the disadvantage of having been evicted from there for the whole seven years remaining" (R. 531). Objection to this statement was overruled, as was an objection to a reference immediately following to "inherent loss which is the value of our leasehold" (R. 531–532). Then followed the statement that "There is an inherent loss there, which I can't put before you in dollars and cents, but which has to be reflected in the value of that lease" (R. 532).

After referring to his own witnesses' appraisals of $65,000.00 to $75,000.00, he returned to the subject of the Government's rental which, he said, "our appraisers think is a high figure, what our appraisers, being honest men were not willing to say was the true value of that space" (R. 532). He continued (R. 532–533):

> Now, you ladies and gentlemen, here and I are taxpayers. I am appalled for this reason, or from this standpoint, and you, too. When the five years are up, what happens? Either the Government moves out, leaving all of their improvements, and you and I pay for it; or possibly they exercise their option, stay another five years.
>
> By Mr. BEATTY. Object to this as speculative, and not within the issues of the case.
>
> By Mr. PLATT. I never knew I could not speculate with a jury.
>
> By the COURT. Overruled.
>
> By Mr. PLATT:
>
> But ten years go by. There is no more option. Clark-Congress owns the building. If the Government wants it, it has to condemn again, and give Clark-Congress a second award and pay again for every nickel of the improvements that they put into the place. That is the fair deal these boys are foisting on you and me.
>
> Now, I think that you, in the democratic processes, as counsel mentioned, should put

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a stop as best we can, as best you can, in our little way, to the procedure that has been adopted by the Government here; and the only way we can stay "stop" now is to make it cost them some money; and I am saying the measure of that money should be what they threw into the Clark-Congress pockets for the space they have taken from us.

* * * * *

I have given you several ways. I will give you one more before I stop. The Government took 500,000 square feet, the entire building's usable space, under the terms of their lease. Intertype had 10,700 square feet. Let us say 10,000 square feet, just for ease of my arithmetic. Ten thousand into five hundred thousand. Intertype Corporation had one-fiftieth of the space in that building. The Government is paying five million dollars, if you add the improvements, the rent, and so on, to Clark-Congress. On the general theory of condemnation, we owned one-fiftieth of the space; they paid five million dollars for the whole, and we are entitled to $100,000 on that basis.

So, now, I have given you various reasons why my client, Interytpe Corporation, is entitled to a handsome award in this case, and I think that it will be a lesson to Uncle Sam to take more pains in his method of acquiring property at your and my expense.

Counsel for Merchants likewise referred to the lease to the Government early in his argument, referred to the presence of Clark-Congress in the case and said that the Government "just shoved us out" and has the "effrontery" to produce witnesses that its space "is not worth what we paid for it under our lease" (R. 535–536). He then dealt at length with the development and the nature of Merchants' business, its actions in looking for other space to which to move and argued that "this space had a special value to us for all these reasons" (R. 537–541). Shortly thereafter, he returned to the Government's lease, discussed its provisions and the improvements by the Government and computed the value of Merchants' interest at $30,563.00 (R. 542–544). After emphasizing the unwillingness of Merchants to sell to the Government, he argued that it wanted the space badly enough to pay approximately $30,000.00 and "If it is worth that to them, it is fair compensation we are asking, and that is the amount which we think we should have" (R. 545).

On rebuttal, the court upon objection cut short Government's counsel's explanation that the deposit with the declaration of taking covered the interest of Clark-Congress in the space as well as that of petitioners (R. 546–547).

The instructions to the jury, after defining "fair cash market value" stated that "one of the measures" of compensation was the amount the leasehold estate would bring in the market when

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the lessee wanted to sell its lease and the purchaser wanted to buy it (Pet. App. 63; R. 551). After listing the items of moving expenses, etc., the jury was told "to disregard all of such expenses as elements in determining" Intertype's compensation (Pet. App. 64–65; R. 552–553), but was later told that Intertype was to be placed "in as good position pecuniarily as it would have occupied if its property had not been taken" (Pet. App. 66; R. 554). The jury was also told that it was entitled to consider the rental payable under the lease to the United States including the cost of operating the building and the costs of altering and remodeling it (Pet. App. 65–66; R. 553–554). As to Intertype, the jury was told that it could take into consideration "all evidence tending to show the actual value of the space" and that "the special value of the right of use and occupancy due to its adaptability for use in Intertype's business operation due to the special facilities supplied by the Rand McNally Building is an element which Intertype * * * is entitled" to have considered (Pet. App. 67; R. 554). The same instruction was then given as to Merchants (Pet. App. 67–68; R. 555) and the court then went on to repeat the charge that the rental payable by the Government could be considered (Pet. App. 69; R. 556).

The Court of Appeals reversed the judgment and remanded for a new trial (Pet. App. 88). In doing so it said (Pet. App. 86):

* * * we think *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Westinghouse*, 339 U. S. 261 (1950) contain the law applicable to, and determinative of, the major points raised by the Government's appeal in case number 11017. We think those three cited cases are the benchmarks by which the trial court should be guided on this remand.

Since condemnation juries are impaneled only for deciding compensation they commence deliberations in a positive awarding-state-of-mind. An especially delicate equilibrium, acutely sensitive to factors influencing the quantum of award, is present throughout such trials. Perhaps we are underscoring the obvious, but it is our opinion that the jurors' critical and difficult function, here, should not be further complicated by blurred and insufficient instructions or by improper arguments. [See e. g.: *United States* v. *Miller*, 317 U. S. 369, 381 (1943); *Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892 (8th Cir. 1941)] concerning and pointing up deposits made by the Government pursuant to statute.

ARGUMENT

1. In seeking review of the Court of Appeals' reversal of the condemnation judgment, petitioners assert (Pet. 20): "Petitioners and the trial judge are left in the dark as to why the Court

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of Appeals has reversed the awards of just compensation based upon the jury verdicts. The 'harmless error' rule (Rule 61, F. R. C. P.) is ignored, and the verdicts set aside with no apparent grounds." This is simply not so. As petitioners are well aware (Pet. 20), the opinion of the Court of Appeals assigned as one of the reasons for reversal the improper argument "concerning and pointing up deposits made by the Government pursuant to statute" (Pet. App. 86). The declaration of taking had not been received in evidence, but over the Government's objection counsel for Intertype was permitted to argue therefrom that the estimate as to just compensation for the space occupied by Intertype was the Government's estimate of the just compensation payable to Intertype, and that, therefore, the much lower valuation by the government expert was not credible (R. 525–527). Inasmuch as the deposit covered the estimated compensation for the interest of Clark-Congress as well as Intertype (R. 8, 11), there was no basis for the argument. But more important, the deposit with a declaration of taking is not a judicial admission by the United States or any evidence of value, and should not be taken into consideration in the determination of just compensation. *Ramming Real Estate Company* v. *United States,* 122 F. 2d 892, 894 (C. A. 8); *Chapman* v. *United States,* 169 F. 2d 641, 644 (C. A. 10); cf. *United States* v. *Miller,* 317 U. S. 369, 381. And the error in the

line of argument was magnified by the refusal to permit government counsel to explain the nature and function of the declaration of taking and the deposit (R. 547). Cf. *Chapman* v. *United States,* 169 F. 2d 641, 644 (C. A. 10). Clearly, this cannot be said to be "harmless" error. Cf. *McCandless* v. *United States,* 298 U. S. 342, 347–348.

The opinion of the court below (Pet. App. 85–86) makes it plain that the court also considered other parts of petitioners' argument to the jury to be improper and prejudicial. And it is obvious from their argument that petitioners' counsel were deliberately attempting to arouse the passions of the jury for the purpose of obtaining a "handsome award" (R. 533; see *supra,* pp. 12–16). There can be no other explanation for such statements as: "They just shoved us out. And then the government has the effrontery to come into court and to produce witnesses who will tell you ladies and gentlemen that that space is not worth what we paid for it under our lease" (R. 536), and, "The money the Government has paid in the form of a new lease, in the form of rental, in the form of taking the operating costs over of the Clark-Congress Building, is already in their pockets, or will be in their pockets after a five-year period. They are giving us no chance at that money, which we are rightfully entitled to under ordinary condemnation. Now, that is a nice little trick, and this jury may or may not let them get away with it" (R. 530). And the argu-

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ment became more prejudicial with such statements as: "I am appalled" (R. 532), "That is the fair deal these boys are foisting on you and me" (R. 533), "the only way we can say 'stop' now is to make it cost them some money" (R. 533), and climactically, "I think that it [a handsome award] will be a lesson to Uncle Sam to take more pains in his method of acquiring property at your and my expense" (R. 533). Even absent the objections which were made here, such argument warrants a reversal. *New York Central R. R. Co.* v. *Johnson,* 279 U. S. 310, 318–319; *City of Fort Worth, Tex.* v. *United States,* 212 F. 2d 474, 477 (C. A. 5).

2. There is also obvious error in such matters as the admission of petitioners' evidence of a mere offer to lease, the rejection of the Government's offer of actual leases, and the admission of testimony as to the Government's lease of the building from Clark-Congress (*supra,* pp. 7, 10–11). In themselves, these matters constituted sufficient grounds for reversal. *Sharp* v. *United States,* 191 U. S. 341, 348–350; *United States* v. *5139.5 Acres of Land, in Aiken and Barnwell Counties,* 200 F. 2d 659, 661–662 (C. A. 4), and cases there cited; *United States* v. *13,255.53 Acres of Land in Burlington and Ocean Counties,* 158 F. 2d 874, 877 (C. A. 3), and cases there cited. But these same matters and other incidents at the trial demonstrate conclusively that the case was tried on the

theory that market rental value was not the onl
measure of compensation, but that the jury shoul
also consider special value to the condemnee an
condemnor and any enhancement due to the Gov
ernment's project (*supra*, pp. 9–17). For ex
ample, petitioners' contention was "Market valu
with reference to lease means very little" (R
481), so that, as the court agreed (R. 494), specia
value to the tenants should be considered as we
as market value. But in *United States* v. *Petty*
Motor Co., 327 U. S. 372, a case where, as here
the entire leaseholds were taken,[8] this Court re
jected a similar contention and held that the con
demnation of all interests in a leasehold should b
treated like the condemnation of all interests i

[8] The interest taken by the Government here was th
right to occupy the space involved for a period from Jan
uary 1, 1952, to December 31, 1956, with the option t
renew for five additional years to December 31, 1961 (R
8). Merchants' lease expired on August 31, 1953 (Pe
App. 73), so that its entire term was definitely taken with
out regard to the option to renew. Intertype's lease ex
pired by its terms on December 1, 1958 (Pet. App. 73), bu
the application of the doctrine of *United States* v. *General*
Motors Corp., 323 U. S. 373, was obviated by a stipulation
that the effect of the taking of the five-year term by th
Government was the total destruction of Intertype's lea
and that it was relieved of all its obligations under it
lease (R. 108–109). The court below apparently over
looked this stipulation in commenting upon the litigation
between Intertype and Clark-Congress (Pet. App. 85
However, petitioners' argument therefrom (Pet. 39)
based upon a misreading of the opinion and is immateria
here. Of course, the Government does not consider th
stipulation as abrogated.

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the fee (327 U. S. at p. 378). Thus, this Court stated in defining just compensation (327 U. S. at p. 377): "This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.'" And even in *United States* v. *General Motors Corp.*, 323 U. S. 373, 383, where only a portion of a leasehold was taken, "market value" was adhered to as the measure of compensation. See also *United States* v. *Westinghouse Co.*, 339 U. S. 261, 263–264, 266. Plainly, therefore, the *Petty Motor, General Motors* and *Westinghouse* opinions were not, as petitioners assert (Pet. 19), "scrupulously followed throughout the trial." The failure to do so and the consequent adoption of an erroneous measure of compensation required reversal.

The consideration of the rental in the Government's lease, together with the amount expended by the Government in converting the structure from a loft building to a modern office building, was especially prejudicial, since it is the only evidence that can support the verdicts. As we have shown, *supra*, p. 11, one of petitioners' witnesses estimated that the Government was paying a rental of $3.76 per square foot, including $1.15 per square foot as the amortized cost of the conversion (R. 361–362), and in argument to the jury the evidence was pointed to as supporting an award of $164,810.00 (R. 522). The receipt of any evidence as to rental paid by the Government was erroneous (*United States* v. *13,255.53*

Acres of Land in Burlington and Ocean Counties, 158 F. 2d 874, 877 (C. A. 3), and cases there cited), but the error was compounded here by the fact that the evidence admitted did not relate to the value of the loft space taken from petitioners, but rather to the value of the space in a building which was radically altered and considerably improved by the Government at great expense. Obviously, such evidence violated the fundamental concept of just compensation as the market value of the interest taken ascertained as of the date of taking. *United States* v. *Miller,* 317 U. S. 369, 373–374; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377. Counsel for Intertype expressed the opinion that such evidence would have a "tremendous effect on the jury in my favor" (R. 461). That it did is conclusively demonstrated by the fact that although, as counsel realized (R. 520, 527), the testimony of his witnesses would justify an award of $56,175.00 at the most and that even the deposit with the declaration of taking could be said to support an award of only $73,500.00, the jury verdict was for $131,500.00 (R. 616).[9] Similarly, although counsel for Merchants analyzed the evidence, including

[9] Thus, petitioners' attempt (Pet. 20) to distinguish the holding in *Ramming Real Estate Co.* v. *United States,* 122 F. 2d 892 (C. A. 8), is without any basis here, since the computation based upon the deposit was higher than any testimony except the also inadmissible evidence as to the rental paid by the Government.

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the rental provided in the government lease, as justifying an award of $30,562.00 (R. 545), the jury verdict for Merchants was in the amount of $43,750.00 (R. 617). Plainly, the court below was fully justified in characterizing the awards in this case as, in effect, a raid upon the Treasury.

3. Petitioners also assert (Pet. 31–34) that the condemnation proceeding was unauthorized and therefore illegal. Since they filed no cross-appeal from the final judgment in condemnation, it does not appear that they have standing to raise such an issue here. Moreover, since the acceptance of this contention would lead only to a reversal with directions for dismissal of the cause instead of for a new trial, the contention is against their interests, unless it is their purpose to look to Clark-Congress alone for their compensation. But in any event, it is clear that the condemnation proceedings were valid for the reasons stated in *United States* v. *Advertising Checking Bureau,* 204 F. 2d 770 (C. A. 7). And the fact that the Act of August 27, 1935, Section 3, 49 Stat. 886, as amended, 40 U. S. C. 304c, prohibits the procuring of space by lease for more than five years does not invalidate the proceeding since the additional period here involved is at the future option of the Government. Cf. *Leiter* v. *United States,* 271 U. S. 204, 206–207. Likewise, the limitations of the Act of June 30, 1932, Section 322, 47 Stat. 412, 40 U. S. C. 278a, are of no relevancy to the claims of these

tenants. Finally, even if the declaration of taking and the deposit of compensation were defective, a conclusion with which we do not agree, the condemnation proceeding would not be vitiated, since the declaration of taking procedure is merely ancillary to a condemnation suit. *Catlin* v. *United States,* 324 U. S. 229, 240.

CONCLUSION

The decision below, remanding for a new trial, is correct. There is no conflict of decisions and no question of general importance is presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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